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SOME OBSERVATIONS ON MILITARY OCCUPATION*

CHARLES FAIRMAN†

CURRENT civil affairs operations overseas, notably our German occupation, claim at least one column in each day's newspaper. These are the mature phases of an experience that began in North Africa in 1943. Much less has been written of the problems of military government as they arose while hostilities were still in progress. Considerations of security and the press of each day's concerns prevented at that moment any full explanation of what was being done and why. Measures which were then adopted, however, have to a considerable extent been carried over into the structure and practice of our post-hostilities occupations.

I

The Tunisian campaign had cleared North Africa of the enemy in May 1943. July 10 was D-day for Operation HUSKY, the attack on Sicily. Let me recall the circumstances under which the Allied Military Government for Sicily was organized.

General Eisenhower's experience with an Allied staff, in London and then in Algiers, had demonstrated the practicability of an integration of British and American personnel in a theater headquarters. This success led to a more difficult undertaking: it was decided that the Allied Military Government of Occupied Territory should be administered by combined personnel at all levels.¹

*An address before the Commonwealth Club of California, at San Francisco, August 1, 1947. The text has been revised in a few points to bring it down to date; it has also been expanded to develop matters in which lawyers may perhaps find a particular interest.

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1. The directive on Military Government in Sicily is set out in Hajo Holborn, *American Military Government*, Washington, Infantry Journal Press, at p. 114 (1947).

In late May and June, 1943, several hundred American and British officers arrived at Chrea, a small resort in the mountains behind Algiers. This merits a moment's description, since it was the prototype of numerous A.M.G. planning and training centers. One selects some group of institutional buildings, such as a school or a resort, where there are facilities for offices and conference rooms, messes and sleeping quarters. It should be secluded for reasons of security, yet near enough to headquarters to permit easy communication between the planners and the staff sections with which they must deal. Men selected for key positions are sent in first, if they are available,—to carry forward the planning and to work out standard procedures. No small undertaking, you will realize, to effect within a few weeks an integrated organization subdivided into sections dealing with law, finance, police, public health, civilian supply, control of property, education, fine arts and monuments, and so on. The quality of officers assigned to military government, in this and later operations, was very high in the main, and often even distinguished. There was need for men who possessed not only varied professional qualifications, but also a breadth of view which would enable them to apply their special skills under abnormal conditions in an alien land. When an organization is composed of different nationalities, it takes a bit longer to shake down. There are some basic issues to be settled, such as whether one has coffee or only tea for breakfast, and whether dinner comes at six or eight o'clock, or some acceptable hour in between. But with everyone on his best behavior and determined to make the combination work, the results were in the main surprisingly successful. Certainly there was a readiness to recognize outstanding competence wherever it appeared.²

Exercises such as these in combined international action were one of the most valuable by-products of the hostilities against the Axis. Later the French were brought into the system of Allied Military Government, on the occasion of their attack on Elba and later the invasion of the south of France. This too proved successful, though the common action was less sustained and the understanding was less intimate.

As D-day approaches, the combined military government teams slip away from the training center to join the tactical units to which

2. Cf. the remarks of Major General Lord Rennell of Rodd, "Allied Military Government in Occupied Territory," (July 1944) 20 *International Affairs* 307-16. Lord Rennell speaks of the background of British experience with military administrations in African territories, as well as of the early days of AMGOT.

they have been attached. Presently the invasion is made, and shortly thereafter, as soon as there are civilians within the lines to be controlled, the military government officers in the advanced units go ashore and get to work—seeing to it that the civilian dead are buried, that the water system is put into operation, that stores of food are distributed in an orderly fashion, and similar measures of first aid. In some quarters there was a tendency at first to regard military government officers as fancy personnel sent to put frills and furbelows on the war. The Sicilian operation showed, however, that they were very handy people who relieved a commander and the rest of his staff of bothersome civil problems, thus permitting attention to be concentrated on the immediate grim business of the war.

Military Government connotes a situation where the commander of the armed forces rules a territory from which the enemy has been expelled. It is a condition of fact, based upon paramount force. The manner in which such an occupation is carried out is controlled by certain provisions of the Hague Convention of 1907 concerning the laws and customs of war on land. But as a general observation it may be said that if the occupying force does nothing but what is fair and decent it will probably not offend against the law of nations. Seeking as we were to redeem peoples long inured to dictatorial rule, the very accomplishment of that purpose required that we observe liberal policies in our military government, quite aside from the legal duty to conform to the Hague rules.

For example, procurement problems in occupied territory.³ It is notorious that the German forces sought not merely to live off the country, but also rapaciously to sponge up its substance to send home for consumption within Germany. Allied policy, in contrast, was to purchase only those commodities of which there was actually a surplus. To effect that policy in Italy, an Allied Force Local Resources Board was set up to determine what commodities—such as fruit and vegetables—were superabundant and thus available to army quartermasters. Presently it even became possible to restore some trade between localities, but of course the dearth of transportation is one of the biggest facts in civil affairs. The Resources

3. On military procurement and particularly on the financial measures of Allied Military Government, see an admirable little book by Professor Frank A. Southard, Jr., *The Finances of European Liberation*, (1946). Commander Southard was Financial Adviser in G-5 Section, AFHQ, and later Chief, Economics and Finance Branch, Civil Affairs Hq., Seventh (U.S.) Army; he had a large share in the administration of the policies of which he writes.

Board also exercised general supervision over the requisitioning of facilities and the employment of civilian labor by the army. Allocation of building space; labor relations, including wage scales and social security in a period of rising prices:—needless to insist that these are major problems even in our own well-ordered communities. They were merely two of many major items on the agenda of the Allied Military Government. Of course, the Army will take the space it needs, without having to negotiate. But suppose a quartermaster truck company grabs a garage needed for the rehabilitation of civil transport; if local foodstuffs cannot be distributed, a hungry populace will clamor for food, which makes bad publicity; then the military government officer will ask that quartermaster trucks be assigned to move food—and so it is demonstrated that civil affairs are really a part of the army's mission and that short-sighted measures are self-defeating.

With labor, too, our military government cannot really shove the local population around as perhaps you might suppose. To be sure, it is not appropriate for the Army to sit down and bargain collectively with its workers in a hostile land, and during hostilities strikes will not be countenanced. But in order to restore the local economy we will bring labor and civilian employers together to agree on wages;—and then if we want to assure a ready supply of workers at our own installations we will probably offer a slight premium over the prevailing wage level. Of course, the opportunity to buy a meal from the army, on the job, will have a terrific allure for hungry men.

Mention should be made, in passing, of the excellent work done by military government officers who brought the Sardinian coal mines back into production—thereby providing an essential to industry and liberating some Allied shipping. Coal mining has its own problems, in the Ruhr and even in America. In Sardinia the task was made more difficult by certain technical problems peculiar to the handling of Sardinian coal.

Civil supply is probably the toughest problem of all in the earlier phases of military government. Supply programs must be made and revised on the basis of numerous highly tentative assumptions—how many civilians will be found within our lines, what stocks will have eluded the retreating enemy, how large the local harvest will be, how much the Army can spare for civil relief. When the objective is not much above a subsistence level, a small set-back may produce a serious crisis. From the purely tactical point of view, food for enemy civilians has a low priority. From

the point of view of psychological warfare, it will lower the will to resist if we can beam out to the enemy's country stories of the lush life that comes in the wake of our armies. The Military Government will have to deal with the problem of hoarding. Authoritarian governments long ago found that frightfulness is not wholly effective to cure this evil, and in any event that measure is not in our repertory. So officers responsible for civil supply must exert their ingenuity, while they rely upon police and the orderly procedure of the military government courts to deal with hoarders.

An efficient local police is a valuable adjunct to the machinery of occupation, and the responsible military government officers will have concerted plans for screening the local forces on arrival, throwing out the political police and other malignant elements. Outsiders cannot know the ins and outs of the local situation, and economy of our own personnel requires that the greatest practicable use be made of the salvageable portion of the indigenous police and gendarmerie.

And here a word on defascistization in the early phases of military government. One of Allies' initial proclamations decreed the dissolution of the Fascist Party and affiliated organizations, and declared that the Chief Civil Affairs Officer would from time to time issue orders annulling discriminatory and otherwise objectionable laws.⁴ So far so good; this is easy. But the actual business of abrogating the hateful features of Fascist legislation is not a simple matter of tearing certain offending pages from the statute book. The eradication of Fascist principles calls for careful revision, with the technical aid of competent anti-Fascist lawyers. All this takes time. Similarly with the work of "Euration." Of course, the most obnoxious Fascists holding key positions in the civil service, banks, utilities and so on should be dismissed on the spot. But in the main these people are not detectable at sight, and they will have hastened to ingratiate themselves with the conquerors. They make themselves indispensable in their jobs, or prove socially eligible. Some military government personnel will be naive or obtuse. They must rely on somebody, and may get started with the wrong people. But when we recall how war profiteers, political fixers, even characters from the underworld, may flourish conspicuously in our own society, we need not marvel that the throwing out of the like characters under a military government may not go as fast as newspaper commentators wish.

4. Allied Military Government of Occupied Territory, Proclamation No. 7, for Sicily (July 1943) and then for Italy (Sept. 12, 1943): Sicily Gazette, July 1943, p. 25, and Italy Gazette, No. 1, p. 25.

This induces two observations. First, that the public seems to have gained very little comprehension of the tremendous practical difficulties which attend even the most elementary measures which a military government undertakes when it arrives on the scene.⁵ With destruction all about, community life at a stand still, and civic manhood debased by a generation of Fascist rule, one cannot accomplish miracles in a week. Another general observation: military government abroad tends to disclose the same qualities and frailties which characterize the nation from which it sprang.

While anything approaching an objective evaluation would be difficult to make, I have the impression that our administration of civil affairs abroad has been just a little better than the level of public administration which we tolerate in the United States, taking this country as a whole, and making allowance for the discouraging conditions under which military government has to operate.

The Legal Section has a central position in the organization of a military government. They prepare the proclamations which are to be the statute book of the occupation, work out the organization and procedure of a system of military government courts, and supply counsel and drafting to their colleagues in other sections. There will be need to publish on our arrival and from time to time thereafter, proclamations denouncing offenses against our forces, setting up the occupation courts, imposing a curfew, dissolving the totalitarian party, establishing a bank moratorium, and so on. The preparation of these documents calls for a high standard of legislative draftsmanship. And then to have a really accurate version prepared in the language of the enemy, to have large quantities printed under conditions of absolute security, and to have these bulky packages delivered safely to the invading forces—it is a somewhat anxious task. If a single proclamation fell under unfriendly eyes, the when and where of the attack might be disclosed.

Great care was taken with the drafting of the original set of military government proclamations—to see to it that they conformed to basic principles, were reasonable and fair as between ourselves and the population we were to govern, and were clear in their ex-

5. So, too, in England, as one may learn by reading the Parliamentary Debates of the period. The Sicilian invasion began on July 10, 1943. On July 28 the question was raised in the House of Commons, why were elections not being held in Sicily? 391 Commons Debates 1551-52. The British Army crossed the Straits of Messina on September 3. In the debate on the war situation on September 21 and 22, parliamentary critics asked, why not hold a general election in Italy? 392 *ibid.* 154. Some wanted to know, why not at once bring back Count Sforza, Professor Salvemini, Don Sturzo, and others?

pression.⁶ They stood the test of time, being used almost verbatim in the occupation of the Italian mainland,⁷ whence they were borrowed and adapted for the invasion of Germany.⁸

The system of military government courts was the product of much thought and experimentation.⁹ The American Army has traditionally known two sets of military tribunals: courts-martial, statutory bodies which administer the Articles of War over military personnel and those serving with the forces, and military commissions and provost courts with jurisdiction over the inhabitants of places under military government or control. The British Army makes a similar distinction, using different names. But neither the British nor the Americans who planned the Allied Military Government were prepared to take over the traditional system of the other. So they sat down and worked out a new system for the task ahead, drawing inspiration from both sides. When a scheme was tentatively settled it was tried out in moot courts conducted by the legal officers, with a critique after each trial. This went on until they felt sure that they had a good system with suitable rules of procedure. Analysis shows that there must be a summary court, on the spot, to repress petty offenses—like the J. P. and the police court at home. At the top there must be a court of general jurisdiction, fit to try capital and other serious cases. And between them there must be a superior or intermediate court, which should include a trained lawyer. Provision must be made for the functions which the committing magistrate and the grand jury perform in our municipal law, and for the review of records and sentences. The scheme must be flexible, so as to be workable from D-day to the period of post-armistice control. Every essential of justice must be preserved, but the procedure should have rational simplicity. The system worked out in North Africa survived the test of actual

6. Allied Military Government of Occupied Territory, Sicily Gazette, with supplements No. 2 and No. 3.

7. Allied Military Government of Occupied Territory, Italy Gazette, No. 1.

8. Military Government Gazette, Germany, Twelfth Army Group Area of Control (1945); same, 21 Army Group Area of Control (1945). See Eli E. Nobleman, "American Military Government Courts in Germany," (1946) 40 *Am. Jr. of Int. Law* 803.

9. Allied Military Government of Occupied Territory, Proclamations No. 2, War Crimes, and No. 4, Allied Military Courts: Sicily Gazette, July 1943, at pp. 3 and 13 respectively, and Italy Gazette, No. 1, at pp. 3 and 13; Allied Military Government (Sicily) Proclamations No. 2 & 4 and Rules of Procedure for Allied Military Courts with Outline of Court Procedure, July 1943; Allied Control Commission, Consolidated Instructions for Allied Military Courts with Specimen Forms and Rules of Procedure, 1 May 44.

practice in the field.¹⁰ With very little adaptation, it was carried over into the Allied Military Government of Germany.

One of the major questions in planning a military occupation will be, What shall we use for money?¹¹ This is much bigger than the problem whether the troops shall be paid in yellow-seal dollars or in local currency, and if the latter, at what rate of exchange. It is a responsibility of the occupant to provide for governing the country, and one of the incidents of government is the maintenance of a currency. Money will be necessary to pay the costs of administration and to support the civil economy. Quite likely the enemy as he retreats will seek to embarrass the occupant by a burnt paper policy, so to speak—a scorched earth policy applied to the local currency. So the Allies had to make sure of an adequate supply of money; and since no central bank of issue was at hand, in Sicily or in the early months on the mainland, an Allied Military Lira was brought in and made a legal tender.¹² I should say something of this A. M. lira and its cousins, the A. M. mark in Germany and the A. M. schilling in Austria, as well as another member of the family, the supplemental franc which the Allies emitted in France. Though some eyebrows were lifted when these issues first appeared, each has now found an appropriate paternity,—and in fact they were really legitimate all the time. No one of these issues imported an Allied promise to repay. By the Long Terms of the Armistice,¹³ and again in the Treaty of Peace,¹⁴ the Italian Government assumed liability for the A. M. lira. Upon its recognition in August, 1944, the French Provisional Government

10. Robert N. Gorman, "Military Courts and Military Government in Occupied Areas," (1944) 17 Ohio State Bar Assn. Report 479-86, by one who participated from the beginning.

11. See Southard, *op. cit.*, *supra* note 3; Hearings on the Treasury Department Appropriation Bill for 1946, before the Sub-Committee on Appropriations, House of Representatives, 79th Congress, 1st Session, at pp. 47-52, 56-57, 210-220; Hearing on Occupation Currency Transactions, before the Committees on Appropriations, Armed Services and Banking and Currency, Senate, 80th Congress, 1st Session. The latter hearings were particularly concerned with the question whether this country had sustained a loss through acceptance by Army finance officers of occupation currency issued by the Soviet forces in Germany and Austria, but some information was developed on the initial planning.

12. Allied Military Government of Occupied Territory, Proclamation No. 12, Allied Military Lira Notes, for Sicily (July 1943) and then for Italy (Sept. 12, 1943); Sicily Gazette, July 1943, p. 36, and Italy Gazette, No. 1, p. 36.

13. Department of Statement Bulletin, Vol. XIII, No. 333, p. 749 (1945); (1946) 40 American Journal of International Law, Official Documents, p. 2.

14. Department of State, Treaties and Other International Acts Series, No. 1648.

took over the supplemental franc.¹⁵ The Government of /revivified Austria has absorbed the A. M. schilling in a currency conversion.¹⁶ And the A. M. mark will be fastened upon Germany.¹⁷ Careful accounting at all times has made a distinction between the army paymasters' disbursements of Allied Military currency for the pay of troops and, on the other hand, disbursements to meet the costs of occupation. In France and the other liberated countries, the American and British Governments have made good, in dollars and sterling respectively, such amounts of local currency as were used for the pay of troops. What went for local supplies and services was put down as an off-set against lend-lease. And even though Italy is a conquered as distinguished from a liberated country, the American Government—without the concurrence of the British—gave dollar credits for such quantities of lira as had been used for the pay of the army.¹⁸

The emission of occupation currency is, then, a lawful and proper measure of military government, and in the cases I have mentioned was a necessity. What is important is the policy by which the currency is managed. A military government, like any other government, needs a complete financial program, with such particular objectives as the facilitating of essential industries, the control of inflation, and taxation which will be efficient to administer and salutary in its effects. The Allied Military Governments included fiscal experts who were highly competent both in theory and practice. I dare say that the policies pursued were at any rate not less rational and coherent than the fiscal measures of our own governments at various levels.

The British Military Administration in Tripolitania, and perhaps elsewhere, had maintained an office of Custodian of Property, and this experience had its influence when plans were being made for the Allied Military Government of Sicily.¹⁹ It is my understanding that the British had assumed this function in order to prevent the natives from appropriating Italian and other enemy property. Whatever consideration may have entered into the prac-

15. The text of the Memorandum relating to Currency is set out in Holborn, *op. cit.*, *supra* note 1, at p. 149.

16. Southard, *op. cit.*, *supra* note 3, pp. 39, 195, 198.

17. Par. 20 of the Additional Terms Imposed upon Germany, Proclamation No. 2 by the Allied Commanders in Chief, Berlin, Sept. 20, 1945. Office of Military Government for Germany (U.S.), Military Government Legislation, 23-102, dated April 12, 1946.

18. Southard, *op. cit.*, *supra* note 3, p. 30.

19. Proclama No. 5, *Proprieta Nemica: Tripolitania, Occupazione Britannica, Legislazione Militare, Proclami 1-11*, at p. 27.

tice, international law certainly does not make a military government liable for the safe custody of values which the enemy has deserted or left unguarded. The occupying authorities administer government, and so far as possible maintain public order and safety; but their duty does not rise to the height of making them insurers or trustees. The Allied Military Government changed the title to Controller of Property, thus implying power rather than liability, and made the primary function of the office the protection of the property of American, British, and other United Nations nationals, some of which had been the subject of confiscation, sequestration, or other discriminatory Fascist measures.²⁰ The Office of Controller of Property afforded temporary protection to owners who could not be allowed to send personal representatives into occupied areas until quiet had been restored.

Of course, after the enemy government has been forced to surrender, when military government enters upon the work of reconstruction, there will be large new tasks with regard to the control of enemy property—e.g., the dissolution of large concentrations of economic power,²¹ the vesting and marshalling of enemy assets abroad,²² and the restitution to its rightful owners of property seized by the totalitarian regime.

One of the most important of the long-range objectives of our military occupations has been to foster sound democratic values in the local educational systems. The officers who performed that function in Italy were few in number, but outstanding in their ability and wisdom. To find suitable texts, uncontaminated by Fascism, in adequate quantities, was a large order; to develop liberal teachers was a much larger one. In the American conception of the relation between church and state, the school is primarily a secular concern. A different conception has prevailed widely in Italy,—and this condition was a major factor in the educational problem.

20. Allied Military Government of Occupied Territory, Proclamation No. 6, Controller of Property, for Sicily (July 1943) and then for Italy (Sept. 12, 1943): Sicily Gazette, July 1943, p. 20, and Italy Gazette, No. 1, p. 20.

21. Control Council for Germany, Law No. 9, Providing for the Seizure of Property Owned by I. G. Farbenindustrie and the Control Thereof, Nov. 30, 1945. Office of Military Government for Germany (U.S.), Military Government Legislation 23-121.9.

22. Control Council for Germany, Law No. 5, Vesting and Marshalling of German External Assets, Oct. 30, 1945. Military Government Legislation 23-121.5. Reprinted in United States Economic Policy toward Germany, Department of State Publication 2630, European Series 15, p. 88.

As was appropriate, a much more extended effort has been made at reforming education in Germany and Japan.²³

Freedom of the press is another democratic value we profess among the objectives of our occupations. At home, a licensing act seems odious; we have been taught that the absence of previous restraint is the first condition of a free press. Anyone who desires to start a newspaper—provided he has what it costs—is at liberty to do so. How different the practical situation in an occupied country. Paper pulp exists only as it is brought in by the occupying power. During hostilities, tonnage allocated to paper is so much lost to munitions or supplies for civil relief. Under these circumstances the military government must assume the function of allotting what paper is available among selected applicants, seeking to afford outlets for the expression of diverse views and also to assure a fair geographical distribution. Remember that a newspaper is not merely an organ of political opinion: it serves as a bulletin board for the measures by which the populace is to be controlled,—which is requisite to just and effective administration,—and is quite reasonably regarded by the occupying power as a means of placing its own case before a populace whose outlook has been badly warped. So for a time a publications board must pass upon applications for a license to publish. This is one among many examples of the truth that ways which commend themselves to us at home may not be suited to dogmatic application in an occupied country.

II

When we make war upon a government we seek to force it to surrender. But when it has capitulated—what are we to do with it? Supplant it altogether and administer the country directly by our military government? Permit the existing government to go on functioning, subject thenceforth to our supervision? Or should we take the occasion to create a new administration composed of men who have proved their opposition to the old discredited regime? Here are three broad possibilities, from which the occupant must choose that course which best suits the particular situation. In Italy the Allies saw fit to accept tentatively the existing government

23. Report of the United States Education Mission to Japan [1946], Department of State Publication 2579, Far Eastern Series 11; Report of the United States Education Mission to Germany [1946], Department of State Publication 2664, European Series 16. Professor T. V. Smith, the one member who participated in both of these missions, had served as Director of Education in the Allied Control Commission for Italy. Helen Liddell, "Education in Occupied Germany: A Field Study," (1948) 24 *International Affairs* 30-62.

and build upon it. In Germany there was nothing strong and sound left in the ruins of the Nazi state, so the Allies have been reconstructing from the bottom. I shall speak in detail of the case of Italy.²⁴

Even as the invasion of Sicily began, it was evident that the Italian nation was weary of the war. When news came, on July 25, that Mussolini was out and Badoglio was forming a new Government, one felt that an armistice would be sought—in days or weeks, or a few months at longest. Plans were then being pushed for the invasion of the Italian mainland. When that time should come, what would the situation be:—would the Allies still be fighting Italy?—or would that country have surrendered? In the latter event, would the Germans retire northward to some new line, or would they hold out in the foot of the boot? Each possibility had important consequences for the handling of civil affairs. Consider the situation as it presented itself at Allied Force Headquarters in late July and August 1943. If Italy did not crack before the invasion, then the Allied Forces must be prepared to establish there a complete military government. The Allied Military Government, just then starting to function in Sicily, would be extended to the mainland. Hundreds of additional officers would be required—some of whom were then in a training center near Algiers, some of whom had yet to be found in America and Britain. That was one prospect.

But if Italy were to surrender, how then should civil affairs be handled? It seemed that in that event the wisest course would be to accept the Badoglio Government tentatively, call upon it to carry on under Allied supervision, and establish an Allied Control Commission to direct its policies and guide its administration. This would economize our personnel, and prove the sincerity of our professions that we wished to restore self-government in Italy. But, you may say, Victor Emanuel, Umberto, Badoglio and Company were hardly the crowd to lead Italy toward liberal institutions. Why not throw these discredited personages into the discard and set up a provisional government of true liberals? For many reasons this was not feasible. Where were these strong democrats to be found? The fact is, they simply did not exist in any number in the area first brought under Allied control. Call early elections to

24. The Review of Allied Military Government and of the Allied Commission in Italy, July 10, 1943, D-Day Sicily to May 2, 1945, German Surrender in Italy, prepared by the Public Relations Branch, Allied Commission, though exceedingly condensed, gives the main outlines.

designate new leaders? Out of the question, from every point of view. Political parties had yet to be established, programs must be put forward, and issues needed to be discussed and clarified. Most of all, there was a war going on, which as yet was far from being won—a fact which inevitably postponed many long-range objectives.

So Allied planning had to be prepared suddenly to shift to either of two solutions—a complete military government on the mainland if Italy stayed in the war, an Allied Control Commission if it surrendered. The details of these alternative solutions were being discussed over the cables between AFHIG and the Combined Chiefs of Staff in Washington. Several hundred of the most capable civil affairs officers were just getting to work in Sicily—and communications with Sicily were so crowded with tactical messages that it took some eight days to exchange a word with the military government there. Clearly, the planning for the uncertain future had to be kept in Algiers, at the end of the Washington cable. Several hundred other officers, without the benefit of Sicilian experience, were engaged in a daily revision of plans for handling the Italian mainland. And in the end these two groups, quite unacquainted with one another, must be welded into a single harmonious organization. Needless to say, it took some time to eliminate friction and establish smooth performance.

In the end, as you know, an armistice was signed on September 3 and announced at the moment of the attack at Salerno, a week later. The Germans did not evacuate the southern part of the peninsula, as had seemed a possibility. The Italian Government slipped out of Rome and set up at Brindisi on the Adriatic. Very modest quarters sufficed, for the central "Government" consisted of only a handful of ministers, a faint and somewhat dazed group. Within a few weeks an Allied Control Commission was established in the same city. Its directive charged it to guide the Italian Government toward the development of an effective local administration, capable of functioning throughout the rear areas behind our combat zone. Second, the Control Commission was to urge the Italian cabinet to broaden the basis of its popular support by bringing into its membership representatives of various democratic elements. When at last Rome was taken by the Allies it became possible greatly to strengthen the Government by the inclusion of stronger liberal personalities.

The Italian Government professed a readiness to turn upon

the Germans and help to drive them out. The Allies accepted the offer, and the Italians became "cobelligerants." Now, "cobelligerency" simply describes a condition of fact, wherein we accepted the cooperation of a government with which we were still in a state of war. As the Prime Minister put it, the Italians would be given an opportunity to pay their way. The Control Commission had Military, Naval and Air Sections which set to work to convert the most usable elements of the Italian armed forces to the conveying, guarding and combat functions to which they could best be adapted.

The initial efforts of the Italian Government to develop an effective local administration were disheartening. This illustrates the complete civic debility which results from a totalitarian regime. It was only after months of urging, and repeated delay, that the Italian Government was prepared to accept responsibility for the administration of the rear areas. The Allied Military Government continued, of necessity, to operate throughout the combat zone. Within the Allied Control Commission, however, a system was developed for coordinating the measures of our own Military Government with the Italian administration in the rear areas, and for effecting a smooth transition as successive provinces were handed over to the Italians.

The broad outline of Allied policy in handling civil affairs in Italy has, it seems to me, been vindicated by subsequent developments. Unfettered self-government was restored to the Italian nation, certainly as rapidly as they were able to exercise it. Power passed into the hands of responsible ministers; Marshal Badoglio cancelled out and has even received punishment by the judgment of an Italian tribunal for his earlier share in the Fascist regime. The supervision of the Allied Commission became increasingly light as the Italian Government grew in strength. In fact at all times the problem was to bring the Italians to take up the slack as the Allies loosened the tether. The Soviet Government suddenly exchanged ambassadors with Rome—an anomalous proceeding when peace had not yet been made—and thereby rather hurried the measures of the Allies. Even the "institutional question," whether the Italian nation should become a republic or remain a monarchy under some member of the House of Savoy, was settled in due time by a referendum. Surely as we look back, this was a decision to be taken by the Italians themselves when all Italy was free. It was a sound policy for the Allies to hold these matters in suspense while hostilities were raging.

In meeting these political problems the Supreme Allied Commander, in the Mediterranean and later in the European Theater, had the counsel of an American and a British political adviser, each of whom had an able staff. These offices were on the distribution of all cablegrams which touched upon civil affairs; each had its own channels back to the State Department and the Foreign Office respectively. Consultation between the G-5 (Military Government) Section at AFHQ and these two offices was constant and invaluable in the handling of daily problems. In the making of major decisions for Italy, Mr. Robert Murphy and his British colleague, Mr. Harold Macmillan, had, of course, a very large responsibility. The experience of having a representative from the State Department in an overseas headquarters was a very useful development.

The Supreme Allied Commander²⁵ received his directions from the Combined Chiefs of Staff, which sat in Washington and was composed of military, naval and air representatives of the United States and of the British Government. Under the CCS was a Combined Civil Affairs Committee, composed of members from the War, Navy and State Departments and from the British Staff Mission and the British Embassy. This CCAC drafted the civil affairs directives and handled the Washington end of the constant flow of cablegrams on military government problems. Contrary to the traditional attitude of finding fault with the next higher headquarters, my own opinion was that the messages which originated in the CCAC generally made exceedingly good sense.

The summary of these details illustrates certain difficulties inherent in civil affairs operations in time of hostilities.²⁶ First, the great difficulty in keeping straight on major lines of policy. If we do business tentatively with the government we find on the spot, some people, thinking conceptually, will say that we have "recog-

25. For purposes of internal administration of the U. S. Army Forces—(discipline, pay, supply, replacements, etc.)—there was a Commanding General of the North African Theater of Operations, U. S. Army. General Eisenhower at Algiers was both SAC under the CCS, and CG, NATOUSA, under the War Department. General Sir Henry Maitland Wilson succeeded him as SAC; General Devers followed him as CG, NATOUSA, and became Deputy SAC. General Eisenhower became Supreme Commander, Allied Expeditionary Force—SCAEF—whose headquarters was known as SHAEF. He was also Commanding General of the U. S. Army Force in the European Theater of Operations—ETOUSA. This note is added to make clear that for all strictly American matters—e.g., court-martial jurisdiction—the channels were exclusively American. And of course like arrangements existed on the British side.

26. Professor Harold Zink, in his *American Military Government in Germany*, (1947) develops at great length how far practice, as he saw it fell short of the ideal.

nized" it and so are in honor bound to support and perpetuate it. Others, accepting the premise but rejecting the conclusion, will cry in alarm that the army and its political advisers are backing the wrong horse. Hurried liberals and some emigrés will urge that liberalism be imposed by military authority. But democracy cannot be produced by a stroke of the rod. It takes a long time to develop self-government after a period of totalitarian rule. I do agree, however, that if in the end of the operation we are supporting a reactionary regime, at some point along the line we must have made a mistake.

Next, some technical difficulties inherent in military government. Whereas the G-3 Section, which plans for combat, must be prepared for unexpected reverses, the G-5 Section, planning for military government, must be prepared for great success which brings larger tasks of occupation. Thus personnel may be hurriedly assembled in preparation for an advance which seems never to come. Planning grows stale and morale declines. Again, events move rapidly, or a decision at Washington or Teheran or Yalta results in a change of plans, and civil affairs personnel are plunged into a new situation without opportunity to concert all the details. Military government officers are often men of great self-confidence in their several professions, so that the integration of their ideas takes time. Problems of channels have proved exceedingly vexatious. Military government is a responsibility of command. The general who commands an area exposed to active operations will demand that he have authority over the inhabitants. But military government, also, is a highly developed scheme of administration, and must have its own technical channels to carry out general policies on finance, civil supply, the procedure of military government courts, and so on,—no matter what some division commander might prefer. Combat units come and go, but civil affairs in the town of Spumoni must go on just the same. So there will be tactical channels and technical channels, and until long after hostilities have ceased one may expect an occasional snarl. In Italy the national government, too, was functioning at our behest, and we were endeavoring to confirm and strengthen it. So there would be civil as well as military authorities operating in the same area, and at times the lines of responsibility would become surprisingly complex—with large possibilities for friction and misunderstanding, especially if anyone had a mischievous disposition or were bent upon maximising his authority.

All this goes to explain why a military government requires a little time to shake down. From some newspaper clippings I used to see, dealing with the Allied Military Government of Occupied Territory, I judged that some commentators expected far too much at the start. What most impressed me was the inaccurate orientation and the misconception of fact upon which the interpretations were often based. No doubt one of the initial weaknesses in Allied Military Government was a failure to assure adequate and accurate reporting to the home countries. But in the summer and autumn of 1943 the problems which lay ahead were so urgent and engrossing that there seemed little time for explaining what was already being accomplished. At every echelon, men who are engrossed in the business of dealing on the spot with ever-changing circumstances are prone to assume that the people behind will credit them with seeking sound solutions, and may fail to take account of the expanding vacuum of information at the rear.

III

The Allied Military Government in Italy was dwarfed by that established in Germany. AFHQ at Algiers and Caserta was dwarfed by SHAEF in the European Theater of Operations. G-5 at the former was a small and compact group, though as the load of work increased it had to be expanded. G-5 at SHAEF was from the start a numerous and bestarred aggregation, as befitted the large task for which it was responsible. In both headquarters allied personnel were integrated; but whereas in Italy the military government in the field was composite throughout, in Germany all-American teams went with American units and British teams administered the areas taken by the British forces. The system of military government in Germany was allied, being governed by SHAEF directives; but composite administration was abandoned.

After the German surrender, four national zones of occupation were established, SHAEF was dissolved, and General Eisenhower became Commanding General within the American zone. "Supreme authority in Germany will be exercised, on instructions from their Governments, by the Soviet, British, United States, and French Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council." So ran the statement of the Four Powers on the Machinery of

Control in Germany, made on June 5, 1945.²⁷ Below the Control Council was a Co-ordinating Committee composed of their four deputies, and below that was a so-called Control Staff organized in so-called Divisions—Economic, Finance, Manpower, Legal, etc. But a Division was really four separate national divisions, whose representatives would work together to seek agreement upon measures which, if acceptable all around, would be passed up through the Co-ordinating Committee to the Control Council for enactment. The American contingent certainly brought an abundance of determination and good-will to the task of operating this loose machinery. It was felt, quite rightly, that here would be the test of the ability of the Western Powers and the Soviet Union to cooperate in the post-war world, and "we must make it work." Then for two and a half years the situation has progressively deteriorated, along with all other aspects of our relations with the Soviet Government.

What we have been able to accomplish has been largely by our action at the zonal level rather than in carrying out any common policies for all Germany.²⁸ Within the United States Zone, civil administrations for the Länder of Bavaria, Greater Hesse, Württemberg-Baden and Bremen have, with patience and great pains, been brought into being. Free elections have been held, and democratic constitutions have been framed and adopted. A Länderrat has been established to coordinate the activities of the three states and Bremen, which is also under American control. One of the principal points announced by the Potsdam Conference on August 2, 1945, was that "During the period of occupation Germany shall be treated as an economic unit."²⁹ After a year's effort to realize that decision, the American commander stated in the Control Council of July 20, 1946, that his Government was prepared to arrange with any and all of the other powers for effecting a unified economic

27. *Occupation of Germany: Policy and Progress, 1945-46*, Department of State Publication 2783, European Series 23, p. 81. Also *American Policy in Occupied Areas*, Department of State Publication 2794, p. 12. A very useful collection of basic documents on Germany Under Occupation has been prepared by James K. Pollock and James H. Meisel, Ann Arbor, Mich., George Wahr Publ. Co., 1947.

28. See "American Policy toward Germany," *Foreign Policy Reports*, Vol. XXIII, No. 16, Nov. 1, 1947, wherein Professor James K. Pollock summarizes "The Political Situation." Professor Pollock served as Adviser on Governmental Affairs to the Military Governor (U.S.), and had a very responsible part in the developments he sets out. Also *American Policy in Occupied Areas*, *supra* note 27, at p. 15.

29. Par. 14 of the Potsdam Agreement, Department of State Bulletin, Vol. XIII, p. 153; *Occupation of Germany*, *supra* note 27, at p. 159.

policy. The British alone accepted, and the "bizon" became an economic unit. When at the close of 1947 the London Conference of Foreign Ministers registered another failure to solve the problem of Germany, the American and British authorities moved to establish for the bizon an indigenous German Economic Administration to consist of a cabinet, a legislative body of two chambers, a supreme court and a central bank to regulate currency and credit. While the transformation from a direct military government to control of an administration drawn from the country is inevitably a gradual process, and the difference between the two is a matter of degree, our administration in Germany has gone very far toward a position of remote control. Our "military government" supervises rather than governs.³⁰ And it is not very "military," either. OMGUS—the Office of Military Government for Germany (U.S.)—has from the outset included many civilians, and the conversion went on continuously. In common thought, the distinction between "military" and "civil" may seem one of the really great cleavages in the nature of things: in the actual working of occupational machinery it often comes to little more than a difference in pay and allowances (with a great advantage on the side of the civilian). Often the same individuals carry on, minus hardware on the shoulder. So if the Department of State finally takes over the administration of Germany from the Department of the Army—Secretary Marshall has indicated June 30, 1948, as the date in view—one need not look for any great change in method.

These more recent events have been sketched briefly in order to complete the account and to suggest the coherence of our experience from 1943 to the present. There has been continuity in policies, in procedures, and to a considerable extent in personnel. Events since

30. Under date of January 16, 1946, the following instructions were given to all Military Government personnel in the U. S. Zone:

1. It is desired that the following instructions be at hand for constant reference.
2. In general, the instructions to Minister Presidents should be confined to the fullest extent possible to the delineation of policies and should avoid detailed instructions as to the execution of such policies.
3. The German Laender Governments should be required to prepare and present plans for execution of policy for the approval of Military Government. The action of Military Government on such plans should be based only on the compliance of the proposed plans with United States policy and not on its views of the efficiency of the plan. The efficiency of German government is not in itself our responsibility except as a lack of efficiency interferes with the execution of approved United States policy.

Military Government Weekly Information Bulletin No. 28, Feb. 9, 1946, p. 13. Issued by the Office of the Director, OMG (U.S. Zone).

the beginning of 1946 are recounted on the basis of printed records rather than of personal observation.³¹

IV

I have spoken of the administration of justice as an important branch of the business of occupation. At the close of hostilities the prosecution of war crimes became a major problem. I shall be happy if I can throw some light on that much misunderstood matter, and say a good word for a number of gentlemen who seem entitled to a little praise. Case No. 1 before the International Military Tribunal at Nürnberg was only one, though by far the most important, of many war crimes trials held in the European Theater. Justice Jackson, together with his British, French and Soviet colleagues, there prosecuted a dock-full of Nazis leaders indicted for "major" war crimes. Of those convicted, nineteen (of whom one in absentia) were sentenced to death, three to life imprisonment, two to 20, one to 15, and one to 10 years confinement. Three were acquitted.³² Those were the chief among the major figures.

Justice Jackson had a law office of really superlative ability. It had a high going-concern value, and a number of the staff were willing to stay on for further prosecutions. By Executive Order of the President the office was brought under the roof of the United States Military Government when Justice Jackson completed the mission which he performed directly under the President.³³

This Office of the U. S. Chief of Counsel for War Crimes has prepared and brought to trial twelve further cases involving leading

31. Among the materials available for more detailed study are the following official publications. The Office of Military Government (U.S. Zone) publishes a Military Government Weekly Information Bulletin, containing directives, notes on important matters, surveys of German reactions to our administration, and typical press and radio comments. Then there is a British Zone Review: A Fortnightly Review of the Activities of the Control Commission for Germany (B.E.) and Military Government. This has the format characteristic of a British journal of opinion, with letters and notes, a review of the world press, reports on developments in other zones, an open letter bag, and a featured guest writer for each issue. The French Zone has its journal, originally called Articles et Documents, then La Revue de la Zone Française, and after July 1946 La France en Allemagne. This includes excerpts from the Journal Officiel du Commandement en Chef Français en Allemagne, articles, statistics, a chronicle of events, and, characteristically, makes a feature of reports on expositions of French culture. The French Government publishes, through its Service Française d'Information, a publication entitled La Documentation Française, of which title VI, Allemagne, contains information on conditions in the several zones of occupation.

32. Office of the U. S. Chief of Counsel for Prosecution of Axis Criminality. *Nazi Conspiracy and Aggression: Opinion and Judgment*. Washington. Washington, Government Printing Office, 1947.

33. Executive Order 9678 of Jan. 16, 1946, amending the original Executive Order 9547 of May 2, 1945, whereby Justice Jackson was appointed.

Nazis charged as major war criminals.³⁴ The so-called military tribunals before which these cases are brought have been convened at Nürnberg by order of the Military Governor, U. S. Zone. The members have all been designated by Executive Order of the President, and in the main are judges or former judges of State courts, appellate or at least of general jurisdiction.³⁵ A very serious effort

34. For the statistics on war crimes trials given herein I am indebted to the War Crimes Branch of the Civil Affairs Division, Special Staff of the Department of the Army.

The following summary conveys some idea of the nature of the cases tried at Nürnberg before military tribunals of the Military Government (U.S. Zone):

Case No. 1—Medical Case
23 defendants

Counts:

- 1—Common Design or Conspiracy
- 2—War Crimes
- 3—Crimes Against Humanity
- 4—Membership in Criminal Organization

Case No. 2—Erhard Milch Case
1 defendant

Counts:

- 1—Slave Labor
- 2—War Crimes
- 3—Crimes Against Humanity

Case No. 3—Justice Case
14 defendants

Counts:

- 1—Common Design or Conspiracy
- 2—War Crimes
- 3—Crimes Against Humanity
- 4—Membership in Criminal Organization

Case No. 4—Oswald Pohl Case
18 defendants

Counts:

- 1—Common Design or Conspiracy
- 2—War Crimes
- 3—Crimes Against Humanity
- 4—Membership in Criminal Organization

Case No. 5—Friedrich Flick Case
6 defendants

Counts:

- 1—Slave Labor
- 2—Spoliation in Occupied Territories
- 3—Aryanization
- 4—Membership in Criminal Organization

Case No. 6—I. G. Farben Case
23 defendants

Counts:

- 1—Aggressive War
- 2—Plunder and Spoliation
- 3—Slavery and Mass Murder
- 4—Membership in SS
- 5—Common Plan or Conspiracy

Case No. 7—Hostage Case
12 defendants

Counts:

- 1—Mass Murder
- 2—Plunder and Spoliation
- 3—Illegal Executions
- 4—Slave Labor

Case No. 8—SS Generals Rusha
14 defendants

Counts:

- 1—Crimes Against Humanity
- 2—War Crimes
- 3—Membership in Criminal Organization

Case No. 9—SS Einsatzgruppen
23 defendants (SS Officers)

Counts:

- 1—Crimes Against Humanity
- 2—War Crimes
- 3—Membership in Criminal Organization

Case No. 10—Krupp Case
12 defendants

Counts:

- 1—Crimes Against Peace
- 2—Plunder and Spoliation
- 3—Slave Labor
- 4—Common Plan or Conspiracy

Case No. 11—Foreign Office Case
21 defendants

Counts:

- 1—Aggressive War
- 2—Common Plan and Conspiracy
- 3—War Crimes
- 4—Crimes Against Humanity
- 5—Atrocities Against Civilian Populations
- 6—Plunder and Spoliation
- 7—Slave Labor
- 8—Membership in Criminal Organization

Case No. 12—Military Case (High Command)
21 defendants

Counts:

Same as Case No. 11.

was thus made to have in every instance a bench of high ability. These tribunals act in pursuance of Articles 10 and 11 of the Charter of the International Military Tribunal,³⁶ and of Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity.³⁷ Law No. 10 recognized as German crimes the same categories of offences as had been declared by the Charter of the International Military Tribunal to be within the jurisdiction of that tribunal; the law further enacted that each occupying authority, within its zone, should have authority to try "before an appropriate tribunal" persons charged with any such crimes.³⁸

35. Executive Orders 9813 of Dec. 20, 1946, 9819 of Jan. 10, 1947, 9827 of Feb. 21, 9852 of May 15, 9858 of May 31, 9868 of June 24, 9882 of Aug. 7, and 9917 of Dec. 31, 1947. The form of the principal section of these orders is this: "I hereby designate . . . as the Members, and . . . as the Alternate Member, of one of the several military tribunals established by the Military Governor for the United States Zone of Occupation within Germany pursuant to the quadripartite agreement of the Control Council for Germany, enacted December 20, 1945, as Control Council Law No. 10, and pursuant to Articles 10 and 11 of the Charter of the International Military Tribunal, which Tribunal was established by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, for the trial and punishment of major war criminals of the European Axis. Such members and alternate members may, at the direction of the Military Governor of the United States Zone of Occupation, serve on any of the several military tribunals above mentioned." In Executive Orders 9852, 9868 and 9917 there was added the declaration "which tribunals are a component part of the military occupational forces of the United States."

36. Department of State Bulletin, Vol. XIII, No. 320, Aug. 12, 1945, p. 222; also Trial of War Criminals, Department of State Publication 2420, p. 15.

Article 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11. Any person convicted by the Tribunal may be charged before any national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

37. Law of Dec. 20, 1945. Office of Military Government for Germany (U.S.), Military Government Legislation, 23-121.10. Reprinted in Pollock and Meisel, *op. cit.*, supra note 27, p. 51.

38. Thus though American in composition these tribunals sit in respect of the existing quadripartite government of Germany, and to enforce what has been enacted as the law of Germany recognizing principles of substantive law and of jurisdiction laid down in an international agreement as international law. The nature of such a tribunal may become a matter of importance in connection with an attempt to discover some mode of review in the courts

The twelfth and concluding trial in these major cases opened at Nürnberg on February 5, 1948. To the close of January 1948, 62 defendants had been convicted, with eleven sentenced to death, thirteen to life imprisonment, and twenty-one to lesser terms of confinement; seventeen were acquitted.

Concurrently with these prosecutions of defendants who stood near the top of the Nazi system, the Army has carried on a comparable effort against persons charged with violations of the law governing the conduct of belligerents. Much less has been known of this activity than of that centering at Nürnberg.

Early in 1945, pursuant to a directive which the War Department sent to all theaters,³⁹ a War Crimes Branch was established in the Judge Advocate Section at Headquarters ETO. Its primary function was the investigation of alleged war crimes against members of the armed forces of the United States and other United States nationals. A number of investigating teams were created and sent into the field, to pounce upon evidence as it was uncovered. Each team had an investigator acting as a prosecutor, and another in the position of defense counsel on behalf of the absent accused. Testimony was taken, with photographs and sound recording where practicable,—with a view to perpetuating evidence of the highest probative value attainable under the circumstances. American forces overran some of the most important concentration camps, notably Buchenwald and Dachau, so that a tremendous and rather unmanageable mass of evidence fell into our hands.

As early as could be arranged after V-E day, the War Crimes Branch began to bring to trial, before American military tribunals, cases of violations of the laws of war to the prejudice of our own military personnel. It also undertook the prosecution of cases of atrocities against internees of Allied nationality at concentration camps, such as Hadamar and Dachau. (Buchenwald lies in what became the Soviet Zone, so that it was impracticable for the Americans to prosecute cases arising there; the evidence was made available to the Soviet authorities.) These prosecutions by the Army stuck close to well-established principles governing the duties of

of the United States. See *Erhard Milch, petitioner, v. United States*, Oct. 20, 1946, 68 S. Ct. 92, denying motion for leave to file petition for writ of habeas corpus. Milch was convicted in Case No. 2 before a military tribunal convened by the Military Governor, U. S. Zone, at Nürnberg. See note 34, *supra*. Justices Black, Douglas, Murphy and Rutledge thought that the petition should be set for hearing on the question of the jurisdiction of the Supreme Court. Justice Jackson took no part.

39. See War Department Circular No. 256, Reporting of War Crimes and Identification of Suspects, Aug. 22, 1945.

belligerents. Most of the trials were held in a court room within the walls at Dachau, which thus became the great trial center for the cases other than those of "major" offenders being conducted at Nürnberg. I knew the lawyers in charge of the conduct of the prosecution of the Nazis who ran the camps at Hadamar and Dachau: they were notably zealous, prudent and competent.

The last of these trials under the responsibility of the War Crimes Branch of the Theater Judge Advocate's office was completed on December 12, 1947. At the close of that year, 489 cases had been tried before United States military tribunals, involving 1672 defendants. Of that number, 256 were acquitted and 1416 convicted, of whom 426 were sentenced to death, 199 to life imprisonment, and the remainder to confinement for terms of years.

I give this account of war crimes trials in the European Theater,⁴⁰ not to enter upon any discussion of the law of the cases, but only to suggest the magnitude of the prosecuting effort as one of the major tasks of our occupation. Discussion at home has tended to run to theories of jurisdiction, and at times has conjured up really unnecessary doctrinal difficulties. Serious fundamental questions have certainly been involved.⁴¹ But actually the most troublesome

40. In Austria, 14 war crimes cases were tried, involving 52 defendants.

In the Pacific Theater, an International Military Tribunal for the Far East has been convened at Tokyo, composed of a judge from each of eleven nations. Trial of Japanese War Criminals, Department of State Publication 2613, Far Eastern Series 12. Twenty-five "major" Japanese defendants are now on trial there. It is not contemplated that there will be any further prosecutions before this tribunal.

As of December 31, 1947, United States military tribunals in Japan had completed the trial of 212 cases of alleged violations of the laws of war, involving 433 defendants. Nineteen were acquitted, thirty-three were sentenced to death, and 381 received lesser sentences. These trials were continuing, with approximately 88 cases involving 358 accused being then ready for immediate trial.

In China, United States military tribunals tried 85 Japanese for war crimes, and 27 German pseudo-diplomats, the so-called Bureau Ehrhardt, an intelligence group who violated the German unconditional surrender by continuing to aid the Japanese after V-E Day. In this case six were acquitted; the leader, Ehrhardt, was given life imprisonment; and the other twenty received sentences ranging from 5 to 30 years. The convicted Germans were transferred to Germany to serve their confinement.

Eighty-seven war crimes trials were conducted before United States military tribunals in the Philippines.

41. Discussion of the case before the International Military Tribunal at Nürnberg has focussed particularly on the question of the propriety of recognizing a new crime of aggressive warfare; but the defendants convicted in that case were also found guilty of offenses already well known in the law of war. The trial of General Yamashita before a United States military commission at Manila came before the Supreme Court on writ of certiorari to the Supreme Court of the Philippines, *In re Yamashita*, (1946) 327 U. S. 1. While the Supreme Court declined to interfere, the record of the military trial made a very poor showing, and Justice Murphy's dissent ranged even

problems have been of a practical and operational nature—e.g., how to locate and organize scattered evidence, how to find in a disorganized and divided country the persons wanted for trial, how to recruit competent personnel in the midst of demobilization, how to administer the housekeeping involved in these large-scale undertakings. Considering the discouraging conditions at the start, these war crimes prosecutions have, I think, shaped up remarkably well.

V

Experience shows many ways in which friction in the conduct of civil affairs could be reduced. I suggest a few within the lawyer's range of special interest. First, there is need to establish and disseminate within the armed forces a more reflective comprehension of problems of civil-military relations. Consider the variety of situations recently presented. We have had visiting forces in friendly countries, have liberated territory for governments in exile which reestablished themselves in our wake, have administered military government over occupied areas, have established Allied Control Commissions to develop and supervise indigenous governments, have contributed American elements to Allied Control Commissions conducted by the Soviet Government, have charged our forces with the defence of colonial territory under the jurisdiction and civil administration of an ally, have maintained a garrison in a place where an ally was conducting a military government, have established bases on neutral territory in order to exclude the enemy, have sent a contingent into a country for the limited purpose of relief and rehabilitation, and have sent abroad military missions for other particular purposes. The very enumeration suggests that there will be difficult problems of jurisdiction, of responsibility, of comity and of cooperation for the common objective. There is no universal solution. Soldiers are prone to adopt an absolute theory based on the authority incident to military command. But the actual

outside the record in its censure. Fairman, "The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case," (1946) 59 *Harvard Law Review* 833, at 866 ff. Probably the legal profession has not realized to what a large degree the war crimes prosecutions have been based upon principles which were really well established, even if lawyers generally had not had occasion previously to examine them. Attention may now be directed to the Law Reports of Trials of War Criminals, prepared by the United Nations War Crimes Commission in London, of which Volume I was published by His Majesty's Stationery Office in 1947. These reports afford a fair view of the quality of the war crimes prosecutions and of the soundness of the judgments. It is believed that a careful reading will yield the conclusion that the cases reported were, in the main, tried and decided upon sound principles.

situations as they arise call for treatment far more understanding than the simple remedy that the commander will issue whatever orders he pleases to all other authorities in sight.

The soldier is right in rejecting responsibility shorn of commensurate authority; he is right, too, in insisting that eventual responsibility be single and not divided. But a responsibility in a commander for coping with certain dangers may not be inconsistent with a responsibility in some other authority for controlling other matters. And even where lines of responsibility for many varied concerns eventually come together at one point, as in the supreme commander in a theater, there will be matters as to which the maximum success can best be achieved by assuring liaison and coordination rather than by relying upon command. These words are general; what counts in actual practice is to work out a proper analysis of responsibilities in the particular situation and then to develop common understanding and cooperation. Coordination between the various elements of a large military command presents a major problem. When army, navy and air forces operate together, effective unity of command encounters further difficulties. When allied forces act together, still other factors enter. And when a theater headquarters is charged with political and governmental concerns, the relation between commanding the forces and administering the territory is most difficult of all.⁴² In the recent war some command-

42. A note may illustrate the problem.

During hostilities, combat is, very obviously, the paramount consideration; military government must occupy a secondary, if important, position. After an armistice this relation changes, until presently the army becomes merely a garrison and military government emerges as the one great activity.

When hostilities in Germany were over, the U. S. Zone was divided into an Eastern Military District, under the Commanding General, 3rd (U.S.) Army with Hq. at Munich, and a Western Military District, under CG, 7th (U.S.) Army with Hq. at Heidelberg. The military government of Bavaria was a function of the Eastern Military District; that for Greater Hesse and the portions of Baden and Württemberg within the U. S. Zone fell under the Western Military District. That is, military government was administered through an Army Hq. See Zink, *op. cit.*, *supra* note 26, at 52 ff.

By G. O. 337, Hq. U. S. Forces European Theater, Dec. 14, 1945, it was directed that as of January 1, 1946, the Offices of Military Government at the Land level would each become an independent command under their respective Directors, who would deal directly with Hq. USFET. Military Government Weekly Information Bulletin No. 22, Dec. 22, 1945, p. 16. The Military District Commanders (i.e., the Commanding Generals of the two Armies) would cease to command or supervise military government; they would, however, remain responsible for providing administrative support and emergency transportation, communications, etc., as well as for security, prisoners of war, disarmed enemy forces, German civilian internees, demobilization of the German forces, and the administration of displaced persons.

If the Director of an Office of Military Government in one of the Länder should find that order could not be maintained with the resources at his disposal (including the German police), he would notify the District Com-

ing generals and chiefs of staff were conspicuously successful in dealing with civil affairs. At the opposite pole is the mental outlook which reduces everything to the focus of a small isolated garrison where command is the universal solvent.

In America we have a rather complicated federal system of government, and it takes a good deal of litigating and conferring and cooperating and influencing to maintain effective operation at the various levels. Think then of the difficulty of achieving smooth performance in a theater of operations where lines of responsibility become surprisingly complex and where the situation is constantly evolving.

The drafting of civil affairs directives also sounds like lawyers'

mander, who would use his troops to restore order, and to the extent necessary for that purpose might assume direct control of civilian agencies and the civilian population, acting, if possible, in agreement with the Director of the Office of Military Government concerned.

Military District Commanders (i.e., CGs of the Armies) retained authority to requisition real property necessary to the discharge of their responsibilities; but all such requisitions would be made through the Office of Military Government. The MG Director might present to the CG Army his views as to the effect of such requisition on military government objectives; but he had no authority to disapprove, and would take prompt action to acquire, through the German authorities, the property requisitioned. After taking such action, the MG Director might submit any objections to the CG USFET, with copy to the CG Army.

Such were the provisions of an excellently drafted G.O.

Here, then, are two major problems which are always present in military government:—security and local procurement. The military government is seeking to develop an indigenous administration; but security may require that the Army commander act directly by the use of his forces. During hostilities, security remains the primary consideration and may be injected into the discussion of any problem whatsoever. Yet precipitate or sporadic action by a tactical commander may embarrass the military government's efforts to carry out liberal policies and develop a responsible indigenous administration. And quite aside from matters of security, there will constantly be occasions when the military government will need the support and friendly cooperation of the tactical units, e.g., for transport, as to which military government seems always to be a beggar.

On the other hand, it is standard procedure to effect requisitions through the indigenous administration: it can perform the task more easily, and the Army does not become deeply involved in the business. Here the tactical units must look to the military government detachments to see to it that the Army gets what it wants. But the Army's desires may be inconsistent with the program for economic restoration which the military government is striving to achieve.

One will realize that in such matters as these, especially when tactical units are moving in and out, a considerable amount of confusion may be expected.

In the light of the separation of military government from the Army command, General Clay, then Deputy Military Governor, sent a letter to the Directors of the Offices of Military Government, stressing the importance of effecting complete cooperation between MG detachments and the occupational forces. Get acquainted with neighboring and higher echelons, not forgetting the Air Force, was the theme. *Military Government Weekly Information Bulletin* No. 40, May 6, 1946, p. 4.

business. Order and clarity of exposition and accuracy in the use of language are among the qualities to be desired. In the practice of headquarters overseas styles have varied greatly. One type is exemplified by President McKinley's directions for our government of the Philippine Islands, and other state papers on foreign occupation, all drafted by Elihu Root as Secretary of War.⁴³ These were directives of the very highest quality, perspicuous in their exposition of principles and their formulation of policies. A good directive ought to address itself to the major conception and then unfold in orderly fashion to deal with particulars, with special cases and contingencies, with administrative arrangements. A lucid statement of the underlying reason, like a statutory declaration of policy, promotes the intelligent construction of the provisions. A directive of the jig-saw puzzle type discloses no logical order and conveys no unity of ideas; minute administrative provisions and specific injunctions crop up amidst statements of policy. The army long ago prescribed an orderly form for each type of operational order. The essential sequence comes to about this: the situation—what are you going to do about it—how are you going to do it—administrative arrangements—post where the commander will be. It seems useful to establish somewhat similar basic outlines for civil affairs directives. It would be helpful to prescribe in a general way a system for arranging and entitling attached documents, to avoid the present confusing want of any uniformity about schedules, appendices, annexes, annexures, inclosures and the like. There is a real gain if everyone who needs to use a document is able at a glance to comprehend its method and arrangement.

Professor Zink in his *American Military Government in Germany*⁴⁴ has described the uncertainty and diversity which result when a civil affairs directive is recast at each headquarters as it goes out to the field. Even as to the policies in force at a given headquarters, a good deal of confusion and contradiction are likely to develop over a period of time. In preparation for any large operation a great volume of directives, plans, administrative memoranda, standard operating procedures, etc., will be promulgated. Presently somebody, say the staff officer charged with the civilian labor service, decides that he would better put out a manual containing everything in all these orders which relates to his particular

43. See Root, *The Military and Colonial Policy of the United States*, Bacon and Scott, eds., 161-327 (1916). Cf. Philip C. Jessup, *Elihu Root*, 2 vols., Vol. I, chs. 17, 18 (1938).

44. *Supra*, Note 26.

activity. A legislative draftsman would advise him to identify each except by a citation of its source. Without such advice, the staff officer does a scissors-and-pastepot job, omitting reference to sources—(since an order is an order)—and making some condensations where he thinks this would improve upon the original. The resulting production is published without being caught. Or again, top brass sees something it does not like and issues a hastily conceived order against it, without bothering to have anyone check to see how this relates to existing policies. Presently the ground is overlaid with partial and inconsistent directions. Of course no war is lost by these relatively small matters; but efficiency would be promoted by a better understanding of what a lawyer would recognize as the method of codification and legislative draftsmanship.

Armistices and intergovernmental military agreements need care in their conception and drafting. This is not a need for introducing "lawyers' technicalities," but rather for integrated documents drawn with simple accuracy to fit actual conditions. The Italian armistice came in two parts, "short terms" of September 3 and "long terms" of September 29, 1943, with certain additional documents relating to the Italian navy.⁴⁵ The resulting situation may be described as messy. Operations over friendly territory give occasion for intergovernmental agreements arranging for local facilities and services needed by the forces. SHAEF had such agreements with the governments of the liberated countries, and arrangements had to be effected for carrying on after SHAEF was dissolved. On such occasions the special staff officers,—say the chief signal officer or the chief engineer, for example,—are apt to submit several pages of the specific provisions they want inserted, with details that read like a General Electric catalog. It is hard to convince these gentlemen that their needs will be better served by a simple stipulation in general functional terms, such as "to take whatever measures may be necessary in order to . . ."

Finally there is need to explore the law of foreign jurisdiction. An expeditionary force gives rise to a host of problems concerning the civil and criminal liability of its members, the extraterritorial administration of military justice, the validity of marriages performed abroad, claims arising from the acts of the forces and of the individuals who compose it, and so forth. Our expeditionary forces have come home, but we remain in occupation. Military and civil personnel, with their families, are living in the occupied coun-

45. Department of State Bulletin, Vol. XIII, No. 333, Nov. 11, 1945, pp. 748 ff.; (1946) 40 Am. Jr. of Int. Law 1 ff.

tries—entering into contracts there, driving private cars on the highways, and on rare occasions making off with bullion or crown jewels. One will realize that questions of jurisdiction arise to which it is difficult to find sound and practical solutions. In the field of constitutional law, some members of the Court have developed restlessness over the question now fifty years old, Does the Constitution follow the flag? Where our Government sends funds for relief or reconstruction, there too in greater or less strength will go missions emanating from the authority of the United States. The operations of these entities on foreign soil will surely give rise to novel questions. Whether we find ourselves acting on our own or (let us hope) on behalf of the United Nations, we may expect to have difficult problems of foreign jurisdiction for years to come. This is one of the incidents of our present international position.